

BACKGROUND PAPER

**WOMEN'S REPRODUCTIVE HEALTH,
THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS,
AND THE
CANADA HEALTH ACT**

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Executive Summary

A review of existing legal controls on women's reproduction uncovers a pattern of special regulation under which certain aspects of women's reproductive health care are treated differently from other medically necessary services. This complex web of legal and social controls includes federal laws on contraceptive devices and fertility drugs as well as birth-related criminal offences and federal powers which may be used to criminalize prenatal maternal conduct and abortion. Provincial and territorial governments also have wide powers to regulate local aspects of health matters. Existing laws establish rules concerning where and by whom abortions can be performed, impose tariffs which may operate as an economic disincentive for physicians performing needed medical services, authorize child welfare agencies to order the supervision and counselling of certain pregnant women, prohibit the practice of midwifery, and yet fail to regulate new reproductive technologies. Previous regulations have required third-party approval or counselling for abortions and have attempted to withdraw funding from sterilization, the insertion of intrauterine devices (IUDs), and abortion. Controls on women's reproductive health care are also imposed by health-care professionals.

Within this context, a major problem facing women in Canada is the timely availability of publicly funded reproductive health-care services. The *Canada Health Act*, which operates as a conditional federal grant in aid to the provinces, requires that their health plans meet the criteria of comprehensiveness, accessibility, universality, portability, and public administration before they merit full federal contribution. These criteria are integral to the national vision of a comprehensive health-service system which is both accessible on uniform terms and conditions and available regardless of one's ability to pay. In some cases, provinces have used their jurisdiction over health in a manner which may be inconsistent with the criteria of the *Canada Health Act*. Medically necessary services may not be provided or may be provided only on special terms and conditions; public funding may be withheld, tightly controlled, or set at unrealistically low rates. The legality of such provisions may be questioned in many different ways.

For example, an offending decision may be impugned directly under:

- an administrative law claim that the government did not have the authority to enact the regulation;
- an administrative law claim that the regulation offends the criteria in the *Canada Health Act*; and/or
- a Charter challenge that the regulation or government action infringes women's constitutionally protected rights.

The legality of full federal payment, when only partial services are supplied, may also be challenged. Thus, a number of arguments can be raised against the federal government to promote compliance with the criteria of the *Canada Health Act*.

A Charter-based challenge to inappropriate government action widens the scope of judicial review and increases the range and efficacy of available remedies. A Charter action is a powerful tool to effect social change and stimulate public

awareness. It provides individual complainants with a direct means to challenge government action and it often forces the government to publicly account for and explain its actions. The *Charter of Rights and Freedoms* is an instrument intended by its framers to relieve against disadvantage (under a purposive approach to sections 7, 15 and 28, where rights are interpreted according to the interests they were intended to protect). As a result, women are entitled to the full amplitude of life, liberty, security of the person, and of equality. Women's ability to bear children should create no exceptions from these rights and no burdens upon them; indeed, the Charter should be used to create the social and legal requirements for their full realization. The Charter, therefore, is an important instrument which should be used to overcome the historical and systemic discrimination against women, address women's material inequality, and accommodate their biological capacities.

In defining the content of Charter rights, the criteria of the *Canada Health Act* may be invoked to determine which legal rights to health care currently exist and to establish our national commitment to publicly funded quality health care for all persons. The criteria of the *Canada Health Act* may be incorporated into a Charter analysis because they represent the minimum standard of health-care benefits voluntarily assumed and recognized by both the federal and provincial/territorial governments. Therefore, the criteria of universality, accessibility, and comprehensiveness may be used to help define the content of women's Charter rights in the health-care context. Because the Act evidences the government's self-imposed health-care obligations, there is little concern of creating constitutional rights to health care from whole cloth or imposing new and positive obligations on either level of government. The courts would merely be asked to acknowledge and enforce bargained-for undertakings according to agreed-upon terms.

When articulating arguments concerning women's Charter rights to reproductive health care, it is important to present a sex equality analysis and to speak in terms of reproductive control and not merely reproductive choice. This dual emphasis requires decision-makers to take into account the real life conditions of women in Canada as a group and within a modern context and reinforces that women require actual services and not merely notional rights. Only in this way will decision-makers, including governments, health-care professionals and judges, begin to recognize and to truly understand that women's childbearing capacities create distinct medical needs which must be met if all persons in Canada are to have reasonable access to comprehensive, accessible, and publicly funded health-care services.